

**New York State Department of Taxation and Finance**  
**Taxpayer Services Division**  
**Technical Services Bureau**

TSB-A-85(60.1)S  
Sales Tax  
July 3, 1986

STATE OF NEW YORK  
STATE TAX COMMISSION

MODIFIED ADVISORY OPINION     PETITION NO. S841115B

On November 4, 1985, an Advisory Opinion was issued to Robert H. Matheis dba Pizza Oven Baking Co., 54 Vine Street, Lockport, New York 14094. Such Advisory Opinion is modified by appending thereto the following discussion of an issue not treated therein.

The issue raised is whether Petitioner's pizzas, sold in an unheated state for off premises consumption, are subject to the sales and use tax imposed under Articles 28 and 29 of the Tax Law when such Pizzas are baked by Petitioner after receiving orders for such pizzas from Petitioner's customers. It is noted that Petitioner's pizza is somewhat unusual in that it is sold and eaten in an unheated state.

Section 1105(d)(i) of the Tax Law imposes a tax upon "[T]he receipts from every sale of ... food and drink of any nature or of food alone, when sold in or by restaurants, taverns or other establishments in this state, ... where the sales is for consumption off the premises of the vendor, except where food (other than sandwiches) or drink or both are (A) sold in an unheated state and, (B) are of a type commonly sold for consumption off the premises and in the same form and condition, quantities and packaging, in establishments which are food stores other than those principally engaged in selling food prepared and ready to be eaten."

The Advisory Opinion issued to Petitioner on November 4, 1985 concluded that" ... if Petitioner can establish that the unheated pizza sold in his establishment for off premises consumption is of a type commonly sold for consumption off the premises and in the same form and condition, quantity and packaging in food stores such as bakeries, then such unheated pizza will not be subject to tax."

This conclusion is equally applicable to pizzas baked by Petitioner after receiving orders for such pizzas and to pizzas which are not baked pursuant to a specific order inasmuch as section 1105(d)(i) of the Tax Law makes no distinction between ordered and unordered food.

It is noted that regulation section 527.8(e)(1) provides, in part:

"(1) Food or drink in a heated or unheated state. The determination of when food or drink is sold either in a heated or unheated state must be made according to the vendor's method of merchandising.

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(i) If the vendor attempts to maintain the food at a temperature which is warmer than the surrounding air temperature by using heating lamps, warming trays, ovens or similar units, or cooks to order, the vendor is selling food in a heated state.

(ii) If the vendor sells prepared foods from units maintained at or below surrounding air temperature, such sales are sales of prepared food in an unheated state." (emphasis added).

Thus, if a vendor cooks food to order and sells the food at a temperature which is warmer than the surrounding air temperature, such food is considered to be sold in a heated state even if the vendor makes no effort to maintain the food at a temperature which is warmer than the surrounding air temperature. However, in the instant case, Petitioner cooks pizzas to order and sells them at room temperature. Accordingly, the provisions of regulation section 527.8(e)(1)(i) do not apply to Petitioner. His pizzas are not deemed to be sold in a heated state merely because they are cooked to order.

It bears repeating that the unheated pizza sold by Petitioner in his establishment for off premises consumption is subject to tax unless Petitioner can establish that such pizza is of a type commonly sold for consumption off the premises and in the same form and condition, quantity and packaging in food stores such as bakeries.

DATED: July 3, 1986

s/FRANK J. PUCCIA  
Director  
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.